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September 10, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: June 4, 2004

Case No.: TIA-0105

XXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the worker's illness was not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.<sup>1</sup>

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the

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<sup>1</sup>/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; [www.dol.gov/esa](http://www.dol.gov/esa).

worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.<sup>2</sup>

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

## B. Factual Background

The record in this case indicates that from March 1951 through March 1984, the worker was a machinist at the DOE's Oak Ridge, Tennessee site. According to the applicant, this job involved working with toxic substances including "atomic weapon components, uranium and beryllium." The record indicates that the worker had abdominal cancer ("intra-abdominal carcinomatosis"). He died from this disease in 1994. The applicant claims that the worker's disease and death were due to exposures to toxic substances at the work site.

The Physician Panel rendered a negative determination on this claim. The Panel unanimously found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was

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<sup>2</sup>/ See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the claim, the Panel noted that the pathology report for the worker showed "metastatic moderate to poorly differentiated adenocarcinoma." The Panel also stated, "the disease of concern is adenocarcinoma of unknown primary origin. There are few occupational risk factor references on this rare disease." The Panel therefore determined that it could not conclude that it was at least as likely as not that an exposure at the DOE work site was the cause of the adenocarcinoma.

However, the Panel did proceed to discuss in a general way in what organ the adenocarcinoma might have originated, and the possible causes for the cancer. For example, the Panel noted that the operating surgeon thought that the pancreas may have been the primary site for the disease. The Panel stated that pancreatic cancer is associated with smoking. The Panel pointed out that the record is unclear when and how much the worker may have smoked. The Panel indicated that pancreatic cancer is also associated with heavy alcohol consumption, but noted there is no reference in the case file to heavy drinking.

The Panel noted that the worker was exposed to radiation, but it was not persuaded that the level of his exposure would have been a risk factor for pancreatic cancer. In addition, the Panel pointed out that radiation exposure has not been widely accepted as a risk factor for pancreatic cancer.

The Panel further observed that the worker had a non-malignant colonic polyp removed in 1976. The Panel stated that the worker was obese for most of his working life and that this is a risk factor for colon cancer. However, the Panel concluded that "there are no work related toxic exposures that may have been contributory to this disease process" (i.e., "malignant colon adenocarcinoma").

Based on the foregoing factors, the Panel issued a negative report for this worker. The OWA accepted the Physician Panel's determination. See OWA June 1, 2004 Letter. The applicant filed the instant appeal.

## II. Analysis

In her appeal, the applicant objects to a number of statements that the Panel made in its report. She claims the worker did not smoke, other than an occasional cigar. She maintains that the worker "was not a drinker." She contends he was not obese. She therefore asserts that the worker's cancer could not have been caused by any of these factors.

These assertions, even if true, would not change the result in this case. The Panel did not determine that the worker's disease was actually caused by any of these factors, and none of them actually entered into the Panel's deliberations. The Panel clearly stated at the outset that the origin of the adenocarcinoma was unknown. It went on to consider some of the likely primary sources of the adenocarcinoma, some non work-related possible causes for the illness, as well as "potential work-related attribution for these diseases." This medical discussion provided some additional insights, but, based on the evidence provided, the Panel could not reach a determination as to the cause of the individual's cancer. Thus, there is no basis for any reevaluation by the Panel based on these objections by the applicant.

The applicant also states that the cancer was widespread throughout her husband's body, and that her husband "must have been exposed to hazardous substances" during the time he worked in an experimental machine shop. She identified beryllium as an exposure. She points to a co-worker of her husband who died of pancreatic cancer during the same week as her husband and asserts this must be more than a coincidence.

The standard in these cases is, as stated above, whether "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death." The above suggestions regarding the cause of the worker's adenocarcinoma, which set forth uncorroborated possibilities and speculation, do not meet that test. Accordingly, they must be rejected. <sup>3</sup>

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3/ There is no merit to the applicant's suggestion that the worker's exposure to beryllium may have caused his adenocarcinoma. It is our understanding that the only illness associated with beryllium exposure is CBD, a granulomatous  
(continued...)

In sum, although the Panel did discuss some possible causes for the disease involved here, the key determination here was that the worker's illness was not related to a toxic exposure at a DOE site. The applicant has not demonstrated any error in the Panel's determination. Consequently, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0105 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: September 10, 2004

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3/ (...continued)  
lung disease. *Worker Appeal* (Case No. TIA-0074), 29 DOE ¶ \_\_\_\_\_ (September 8, 2004).